Petition

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SANTA ANNA MARISCAL A/N/F
OF CESAR JAVIER MARISCAL,

Petitioner,

v.

JOHN C. JOHNSON, EXECUTOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS THIRTEENTH SUPREME JUDICIAL DISTRICT

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QUESTIONS PRESENTED

WHETHER TEXAS' STATUTORY SCHEME FOR INTESTATE SUCCESSION WHICH BARS ILLEGITIMATE CHILDREN FROM SHARING IN THEIR FATHER'S ESTATE CONSTITUTES AN INVIDIOUS DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN THAT CANNOT STAND UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSE OF THE CONSTITUTION.

LIST OF ALL PARTIES

John C. Johnson, Jan Alden Nittler, Dayna Nittler Richardson, Roger Kent Nittler, Billy Don Nittler, Randy Bert Nittler, Jody Trent Nittler, Ciara Louise Lundy, Nancy Kate Gernantz, Linda Sue Fasano, Mark Harold Nittler, Luann Denise Nittler, Cleon George Johnson, La Noe Ann Walthall, Tule Claire Filla, Bobbie Jean Miller, George H. Hollamon, Mattie Louise Jones, Dianna Lynn McBeth, David Earl Johnson, Judy Carpenter, Carey P. McTaggert, Yvonne Courtney, Faye M. Pryor, George L. McTaggart, Annie Workman, Barbara Jo Davis, Herbert W. Johnson, Frank A. Johnson, Janice M. Canady, and Dora Nittler.

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Section 42, Vernon's Ann. Texas Statute ----------3,9,10,11,13

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SANTA ANNA MARISCAL A/N/F
OF CESAR JAVIER MARISCAL,
Petitioner

V.

JOHN C. JOHNSON, EXECUTOR
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS, THIRTEENTH SUPREME JUDICIAL DISTRICT

The petitioner, Santa Anna Mariscal, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Texas, Thirteenth Supreme Judicial District, entered on August 20, 1981, which judgment was refused review by the Supreme Court of Texas on February 10, 1982.

OPINION BELOW

The opinion of the Court of Appeals is reported at 620 S.W.2d 905. The judgment of the lower court, Hidalgo County Court at Law No. 2, the opinion of the Court of Appeals and the unpublished per curiam opinion of the Supreme Court of Texas are set forth in Appendices A, B, and C, infra.

JURISDICTION

The judgment of the Court of Appeals (Appendix B) was entered on August 20, 1981. A timely petition for rehearing was denied on September 10, 1981. An application for writ of error to the Texas Supreme Court was refused on January 6, 1982 (Appendix C). A timely petition for rehearing was denied on February 10, 1982. The jurisdiction of the Supreme Court is invoked under Title 28, U.S.C. Section 1257(3).

QUESTIONS PRESENTED

WHETHER TEXAS' STATUTORY SCHEME FOR INTESTATE SUCCESSION WHICH BARS ILLEGITIMATE CHILDREN FROM

SHARING IN THEIR FATHER'S ESTATE CONSTITUTES AN INVIDIOUS DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN THAT CANNOT STAND UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSE OF THE CONSTITUTION.

STATUTES INVOLVED

V.A.T.S Probate Code, Section 42, eff. May 28, 1977, provides in relevant part:

> (c) Legitimation by Voluntary Legitimation Proceeding. Where a man, having by a woman a child shall afterwards legitimate the child pursuant to a voluntary legitimation proceeding under Chapter 13, Family Code, such child and his issue shall inherit from his father but not from his paternal kindred; and the father, but not the father's kindred, shall inherit from such child and his issue.

The statute is set out in its entirety in Appendix D, infra.

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V.A.T.S. Probate Code, Section 3, eff. September 1, 1977, provides in relevant part:

> Section 3. Definition and Use of Terms
>
> When used in this Code, unless otherwise apparent from the context:

X X X X X

(b) "Child" includes an adopted child, whether adopted by any existing or former statutory procedure or by acts of estoppel, but, unless expressly so stated herein, does not include an unrecognized, illegitimate child of the father.

X X X X X

STATEMENT OF THE CASE

On February 27, 1979, Petitioner, Santa Anna Mariscal, as next friend of the minor child, Cesar Javier Mariscal, filed an Opposition to the Will of L. F. Nittler, deceased, based on Section 67 of the Texas Probate Code. The will of L. F. Nittler, executed on September 24, 1971, when he had no living child or children, had been admitted to probate on February 8, 1979 on the application of the named Independent Executor, John C. Johnson. The parties were living together prior to and at the time of his death. Mr. L. F. Nittler, while in the company of Santa Anna Mariscal, died as a result of an automobile accident on February 6, 1979.

The will made no mention of L. F. Nittler's natural son, Cesar Javier Mariscal.

The child was born on September 26, 1977, in Weslaco, Hidalgo County, Texas. On that date Santa Anna Mariscal was legally married to Belisario

Hernandez. The birth certificate shows Santa Anna Mariscal as the mother but does not identify the father. Santa Anna Mariscal testified that the father's name, L. F. Nittler, was omitted because she feared reprisals from his relatives on herself and on Mr. Nittler. Additionally, there was testimony to the effect that prior to L. F. Nittler's death, the child, Cesar Javier Mariscal, was supported by the Decedent.

Santa Anna Mariscal, although married to Belisario Hernandez at the time of the child's birth, had not seen her husband for 22 years.

The case was submitted to the jury on the following issue: "Do you find from the preponderance of the evidence that Cesar Javier Mariscal is the natural child of L. F. Nittler? Answer "Yes" or "No." The jury's unanimous verdict was in the affirmative. Based on said verdict the trial court entered a judgment declaring that the will of L. F. Nittler was executed at a time when he had no child living or adopted, that at the time of his death he left a natural child, Cesar Javier Mariscal, who was not provided for in said will; that said will previously admitted to probate was void and that the order admitting said will to probate be set aside.

Respondents appealed on the ground that an illegitimate child must be recognized by the father in order to inherit.

Petitioner raised the constitutional question as to this requirement of law in their reply brief (Appellee's Brief), page 7; at page 3[1] and prayer[2] of its Motion for Rehearing to the Court of Appeals; in its Application for Writ of Error to the Texas Supreme Court at pages 4 and 5; and in Petitioner-Appellee's Motion for Rehearing to the Texas Supreme Court at page 4, 6 and 7. The Court of Appeals ruled that an illegitimate child could inherit only if "recognized" by the father as his child. Petitioner then filed a Writ of Error with the Texas Supreme Court which was denied and Petitioner's subsequent Motion for Rehearing was also denied. Therefore, the holding of the Court of Appeals for the Thirteenth Judi-

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1. By her Point of Error No. 7, Petitioner contended: The Court of Civil Appeals erred in reversing tne trial court's judgment by requiring recognition of the illegitimate child while there is no such requirement for the natural child, thereby violating the illegitimate's constitutional right to equal protection under the laws.

cial District of the State of Texas became the holding of the highest court of the state. It is the holding of this court that is made the basis of Petitioner's Petition for Certiorari to this Honorable Court.

REASONS FOR GRANTING THE WRIT

Traditionally at common law illegitimate children could not inherit from their biological father. The U. S. Supreme Court by a long line of decisions has mandated that illegitimate children are protected under the Equal Protection

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2. Petitioner in her Prayer on the Motion for Rehearing to the Court of Appeals stated in part: "Appellee further prays that this Honorable Court find that the reading of the applicable sections of the Texas Probate Code allows illegitimates the same rights afforded to legitimate children in this State and, in the alternative, should this Honorable Court decide that the then applicable sections of the Probate Code not allow for the inheritance rights of illegitimates, then, that these sections be declared unconstitutional.

Clause of the 14th Amendment to the United States Constitution. The case before this Honorable Court pertains to the rights of an illegitimate child who was 16 months old when his biological father died as a result of a motor vehicle accident. The child's parents lived together and supported their child at the time of the father's death. In effect, the parents were returning from the grocery store with milk and pampers for the baby when they met an unexpected accident which took the father's life.

From the beginning of the legal proceedings to contest the will there was no question that the child was illegitimate and the only fact which had to be proven was that he was the child of the decedent. After a jury trial in probate court a unanimous verdict was rendered that the child was the "natural child" of L. F. Nittler, decedent. The Respondents have alleged that in order for an illegitimate child to inherit it must be proven that the father recognized the child as his child. The Petitioner has contended that putting this burden upon her would in effect deny the child his constitutional right to equal protection of law.

To determine the persons entitled to share in the estate of a deceased, the court must look

to the law in effect at the time of the decedent's death. Ramon v. Califano, 493, F. Supp. 158 (W. D. Tex. 1980).

Section 42 of the Texas Probate Code (Appendix D), in effect at the time of the decedent's death, provided that an illegitimate child could inherit from: (a) his mother as if he was the legitimate child of the mother; (b) from his father if he was legitimized by subsequent marriage of the parents; (c) from its father if the father legitimated the child pursuant to a voluntary legitimation proceeding under Chapter 13 of the Texas Family Code; (d) from both parents if the child was born of a marriage deemed null in law.

The decision of the Texas Court of Appeals (Appendix B) on this case suggests that an illegitimate child can inherit in Texas under Texas Probate Code Section 3(b) where it states that an illegitimate child is excluded from inheritance if not recognized by the father.

Therefore, the issue before this Honorable Court is whether Texas' Statutory Scheme, as it affects illegitimate children, can be squared with the Equal Protection Clause. The particular facts in the case at bar can be distinguished with facts in the most recent decision of this

Honorable Court addressing a similar question. Lalli v. Lalli, 439 U. S. 259, 99 S. Ct. 518, 58 L. Ed 2d 503 (1978). It is more aligned with the facts in Trimble v. Gordon 430 U. S. 762, 97, S.Ct. 1459, 52 L. Ed. 2d 31 (1977), in that the Texas Statutory Scheme denied the Petitioner's child any affirmative remedy to protect his inheritance rights.

The opinion to the case at bar by the Texas Court of Appeals provided one additional way for a legitimated child to inherit by means of any involuntary legitimation proceeding brought under Texas Family Code Sect. 13.01 et. seq.[3] However, a closed reading of the Texas Probate Code Sect. 42 (Appendix D), applicable at the time of decedent's death, does not provide for inheritance rights by that means. Therefore, under the Texas Law applicable to this case, the Petitioner was

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3. The opinion providing that an illegitimate child may inherit from the father by means of an involuntary proceeding is found in Appendix 9B. V.T.C.A. Family Code Section 13.01 and Section 13.09 are as follows:

left with insurmountable obstacles to protect his right to inherit; in that he could not affirmatively seek relief to protect his inheritance rights. That is to say that under each and every method of inheritance provided under the code, only the father could take the step to grant the child the right to inherit.

Under the provision of Texas Probate Code Section 3(b) requiring recognition as distinguished from the provision in Section 42(c) requiring voluntary legitimation is, in effect, a distinction without a difference, in that in both situations, it is the father who takes the step to qualify the child for the purposes of inheritance. Petitioner would submit that the requirement of recognition is a carry over from earlier

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Section 13.01. Time Limitation of Suit. A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.

Section 13.09. Effect of Decree Establishing Paternity. The effect of a decree designating the alleged father as the father of the child is to create the parent-child relationship between the father and the

statutes in this and other states that required that the father acknowledge his illegitimate children after he married the mother of the children. These statutes were later revised to permit voluntary legitimation by other means than by the subsequent marriage of the parents.

Therefore, there were only two methods available to Petitioner to insure his right to inherit: (1) voluntary legitimation; and (2) marriage. The illegitimate's property right would then be left to chance, chance that his father would secure a judicial judgment of voluntary paternity or chance that his father and mother would marry before his father's death.

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child as if the child were born to the father and mother during the marriage. Added by Acts 1975, 64th Leg., p. 1261, ch. 476, Sect. 24, eff. Sept. 1, 1975.

The Petitioner had no reason to bring an involuntary paternity since the parents lived together and the father supported the child. The child was 16 months old when the father died, which is beyond the one year statute of limitation set for involuntary legitimation suits. This Honorable Court in Lois Mae Mills v. Dan Habluetzel No. 80-6298 (April 5, 1982) declared this statute unconstitutional.

The Petitioner has by a jury verdict a judicial determination that the child is a child of a particular man, and this judicial determination should be good for all purposes. It is not logical that a child could be a child for one purpose but not for another. There appears to be little doubt that Petitioner's child is the child of the deceased. Where, as here, paternity is established, legitimacy should be irrevelant. The reason for requiring acknowledgement by the father would no longer exist or be necessary. Section 42(a) allows every child to be an heir of his mother, and provides a method for legitimated children to inherit from their father. By providing illegitimate children to inherit from the mother under Section 42(a) and from their father under Section 3(b), as stated by the Texas Court of Appeals, illegitimate children became members of a normally inheriting class which the Due Process Clause protects.

The consistent impact running through the pertinent United States Supreme Court decisions is that discrimination on the basis of illegitimacy requires at a minimum that a statutory classification bears some rational relationship to a legitimate state purpose. Lalli v. Lalli, Trimble v. Gordon, supra, Weber v. Aetna Casualty and

Surety Company, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972). It is Petitioner's position that here it does not. Alternatively, if the statutes in question do bear some rational relationship to a legitimate state purpose, then the statutory obstacles to inheritance by illegitimate children cannot be squared with the Equal Protection Clause.

CONCLUSION

For the reasons stated, the petition for writ of certiori should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, L. Aron Pena, do hereby certify that I mailed three (3) true and correct copies of the foregoing Petition for Writ of Certiorari, with first-class postage prepaid, addressed to Ralph

Alexander of Kelley, Looney, Alexander & Sawyer, Attorneys of Record for Respondent, P.O. Box 237, Edinburg, Texas 78539, on this the 6th day of May 1982.

_____

L. ARON PENA

Appendix

APPENDIX A

13,381

IN RE: THE ESTATE OF	*	IN THE COUNTY COURT
L. F. NITTLER,	*	AT LAW NO. 2, HIDALGO
DECEASED	*	COUNTY, TEXAS

JUDGMENT

BE IT REMEMBERED that on the 22nd day of January, 1980, a regular term of this Court, came on to be heard the above entitled and numbered cause in its due order; when the Contestant, Cesar Javier Mariscal, by and through his next friend, Santa Anna Mariscal, in person and by and through his attorney of record, and came the Proponents, John C. Johnson, Jan Alden Nittler, Dayna Nittler Richardson, Roger Kent Nittler, Billy Don Nittler, Randy Bert Nittler, Jody Trent Nittler, Clara Louise Lundy, Nancy Kate Gernantz, Linda Sue Fasano, Mark Harold Nittler, Luann Denise Nittler, Cleon George Johnson, La Noe Ann Walthall, Tule Claire Filla, Bobbie Jean Miller, George H. Hollamon, Mattie Louise Jones, Dianna Lynn McBeth, David Earl Johnson, Judy Carpenter, Carey P. McTaggert, Yvonne Courtney, Faye M. Pryor, George L. McTaggart, Annie Workman, Barbara Jo Davis, Herbert W. Johnson, Frank A. Johnson, Janice M. Canady, and Dora Nittler by and through

their attorney of record, and all parties announced ready for trial; whereupon a jury of six (6) citizens of Hidalgo County, Texas were duly tested, selected and empaneled and sworn, and the trial proceeded with the introduction of evidence until the 25th day of January, 1980, at which the time the evidence on behalf of all the parties having been concluded and the parties having rested their respective cases, the Court prepared the Charge of the Court and the parties made their objections and exceptions to said charge.

Whereupon, the Jury was seated and charged by the Court, counsel for both parties presented their argument and the case was duly sent to the Jury:

The parties theretofore having agreed and stipulated as follows:

1. That L. F. Nittler died on February 6, 1979.
2. That L. F. Nittler signed and executed his will on September 24, 1971, at a time when he had no living children, natural or adopted.
3. That Cesar Javier Mariscal was born on the 26th day of September, 1977.

A Special issue was submitted as well as the

Charge of the Court and the Jurors answer thereto was as follows:

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that Cesar Javier Mariscal is the natural child of L. F. Nittler? ANSWER "Yes" or "No."
ANSWER: Yes

The Jury having duly returned and deliberated, reached a unanimous verdict and returned the same unto the Court as provided by law on the 25th day of January, 1980. The same was duly received by the Court and ordered filed among the papers of this cause and the Jury was discharged.

It appears to the Court that from the stipulation of the parties and from the verdict of the jury and the law applicable thereto, that at the time such will was made, September 24, 1971, the Testator had no child living or adopted and that at the time of his death on February 6, 1979, he left a natural child, Cesar Javier Mariscal, born to him and that such child was not provided for in such will.

It Is Therefore Ordered, Adjudged and Decreed that L. F. Nittler executed a will on September 24, 1971, that at the time such will was made the testator had no child living or

adopted, and that at the time of his death on February 6, 1979, he left a natural child, Cesar Javier Mariscal, born to him and that such child was not provided for in said will.

It Is Further Ordered, Adjudged and Decreed that the will executed by L. F. Nittler on September 24, 1971 is void, and it is further Ordered, Adjudged and Decreed that the Order Admitting Will to Probate and Authorizing Letters Testamentary entered on February 20, 1979 is hereby set aside and further that all costs of this proceeding be and they are hereby adjudged against Proponents.

SIGNED AND ENTERED this the day of , 1980.

JUDGE PRESIDING

APPENDIX B

NO. 1742

IN THE COURT OF CIVIL APPEALS
FOR THE THIRTEENTH SUPREME JUDICIAL
DISTRICT OF TEXAS
SITTING AT CORPUS CHRISTI, TEXAS

****

JOHN C. JOHNSON, EXECUTOR OF THE
ESTATE OF N. L. NITTLER,
DECEASED, APPELLANT,

V.

SANTA ANNA MARISCAL, AS NEXT FRIEND
OF CESAR JAVIER MARISCAL, A
MINOR, APPELLEE.

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On appeal from the County Court at Law No. 2 of
Hidalgo County, Texas.

****

OPINION

This is a will contest case. Appellants, executor and legatees under the will of L. F. Nittler, deceased, challenge the judgment of the trial court which declared said will void. The judgment was based on the jury's determination

that a child was born to the decedent after the execution of the will. TEX. PROB. CODE ANN. SECTION 67(b) (1980). We reserve and remand.

L. F. Nittler executed a will on September 24, 1971, appointing appellant, John C. Johnson, independent executor and devising his estate to his nieces and nephews. Nittler was previously married on two occasions, neither of which unions produced children. Nittler died on February 6, 1979, and Johnson filed the will for probate and applied for issuance of Letters Testamentary. An order admitting the will to probate and authorizing Letters Testamentary was signed on February 20, 1979.

On February 27, 1979, Santa Anna Mariscal, as next friend of Cesar Javier Mariscal, appellee, filed a petition contesting the will. The contestant alleged that Cesar, born September 26, 1977 (six years after the execution of the will), is the natural child of the decedent. As a pretermitted child, he is allegedly entitled to inherit from his father that portion of the estate to which he would be entitled if the decedent had died intestate. TEX. PROB. CODE ANN. SECTION 67(b) (1980). Because the decedent was unmarried at the time of his death and had no children, the

appellee, therefore, should inherit the entire estate.

Evidence at the trial detailed the relationship between the decedent and Mrs. Mariscal. The two had known each other for some time and were living together at the time the child was born. Although Mrs. Mariscal testified that ther decedent was the father of the child, the birth certificate of the child did not list Mr. Nittler as the father. See Davis v. Davis, 521 S.W.2d 603 (Tex. 1975); Wickware v. Session, 538 S.W.2d 466 (Tex.Civ.App.--Tyler 1976, writ ref'd n.r.e.). Mrs. Mariscal testified that the decedent's name was omitted from the birth certificate to save the decedent and his family embarrassment.

On several occasions, both during the pregnancy of Mrs. Mariscal and after the birth of the child, the decedent allegedly "boasted" that he was the father of the child. Members of his family, however, testified that they never heard such representations. No tests matching blood type or tissue samples were ever performed to establish paternity, nor did the decedent ever execute a statement of paternity under Section 13.22 of the Family Code. TEX.FAM.CODE ANN. SECTION 13.22 (1980). Likewise, no voluntary or

involuntary legitimization proceedings were ever instigated under TEX.FAM.CODE ANN. SECTION 13.01 et seq (1980), nor were adoption proceedings undertaken by the decedent. TEX.FAM.CODE ANN. SECTION 16.01 et seq (1980).

The uncontroverted evidence adduced at trial also established that Mrs. Mariscal was married to Belisario Hernandez on June 6, 1956, and that the parties were never divorced. During the period of time when the child would have been conceived, there was testimony that Mr. Hernandez lived some eighty miles from Mrs. Mariscal's residence. Mrs. Mariscal testified, however, that she had not seen her husband in many years. Under these facts and the admission of all parties, the child was clearly illegitimate. See TEX.PROB. CODE ANN. SECTION 42(b) (1980) and TEX.FAM.CODE ANN. SECTION 12.02 (1980).

All parties stipulated: (1) that L. F. Nittler died on February 6, 1979; (2) that L. F. Nittler signed and executed his will on September 24, 1971, at a time when he had no living children, natural or adopted; and (3) that Cesar Javier Mariscal was born on September 26, 1977. Only one issue was submitted to the jury:

"Do you find from a preponderance of the

evidence that Cesar Javier Mariscal is the natural child of L. F. Nittler?

Answer 'Yes' or 'No'

Answer Yes"

Based on this finding, the trial court entered a judgment which set aside the prior order admitting the will to probate and declared the will void because it did not provide for the child, Cesar Javier Mariscal, born after the execution of the will. From this judgment, appellants bring this appeal.

Three points of error are raised wherein the appellants contend that the trial court's judgment is erroneous because of: (1) the failure of the trial court to submit an issue about whether the illegitimate child had been recognized by the decedent; (2) the lack of standing of the appellee child since the child would not have been able to inherit from the father had the father died intestate; and (3) the lack of clear and convincing proof to defeat the presumption that the child was the product of the union of Santa Ann Mariscal and her husband since there was no evidence of non-access. We need only consider the first point of error to resolve this appeal, that being the failure of the trial court to submit an

issue determining whether the decedent recognized the illegitimate child before his death.

The rights of illegitimate children and statutory classifications which tend to limit those rights have undergone close examination by the courts of this nation in recent years. It is well-settled law that classifications based on illegitimacy, while not being subject to "strict scrutiny," must be substantially related to permissible state interests. Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gorden, 430 U.S. 762 (1977); Weber v. Aetna Casualty & Surety Company, 406 U.S. 164 (1972). These statutes, which tend to differentiate between legitimate and illigitimate children, must bear some rational relationship to legitimate state purposes. As applies to inheritance statutes, the Supreme Court has recognized that the State may apply "a more demanding standard" for illegitimate children who seek to inherit from their father's estate in order to promote the efficient administration of a decedent's estate and to avoid spurious claims arising out of paternity actions. Lalli v. Lalli, supra at 523.

The Texas statutes have been amended in order to provide an appropriate legal framework to

evalute the right of an illegitimate child to inherit from his father if one of several statutory procedures are followed to legitimize the child. See Ramon v. Califano, 493 F.Supp. 158 (W.D.Tex. 1980); Lovejoy v. Lillie, 569 S.W.2d 501 (Tex.Civ.App.--Tyler 1978, writ ref'd n.r.e.).

> "Section 42. Inheritance Rights of Legitimated Children
>
> (b) Paternal Inheritance. For the purpose of inheritance, a child is the legitimate child of his father if the child is born or conceived before or during the marriage of his father and mother or is legitimated by a court decree as provided by Chapter 13 of the Family Code, or if the father executed a statement of paternity as provided by Section 13.22 of the Family Code, or a like statement properly executed in another jurisdiction, so that he and his issue shall inherit from his father and from his paternal kindred, both descendents, ascendants, and collaterals in all degrees, and they may inherit from him and his issue."
> TEX.PROB.CODE ANN. SECTION 42 (1980); see Bell v. Hinkle, 607 S.W.2d 936 (Tex.Civ.-App.--Houston (14th Dist.) 1980, no writ); Mata v. Moreno, 601 S.W.2d 58 (Tex.Civ.-App.--Houston (1st Dist.) 1980, no writ.)

This statute, while providing a means for the illegitimate child to inherit from his father by way of statutory legitimization, also serves state interests by establishing safeguards to protect the sanctity of a will and to provide for

the orderly settlement of estates. As such, equal protection of the laws is afforded to illegitimates.

The Probate Code in 3(b) provides another means for an illegitimate child to inherit from its biological parents without complying with these statutory legitimization procedures. The definition of a "child" as set out in the Code is as follows:

> "(b) 'Child' includes an adopted child, whether adopted by any existing or former statutory procedure or by acts of estoppel, but, unless expressly so stated herein, does not include an unrecognized, illegitimate child of the father." (Emphasis supplied.) (TEX. PROB.CODE ANN. SECTION 3(b) (1980).

By expressly excluding an "unrecognized, illegitimate child of the father," the statute impliedly provides that a "recognized, illegitimate child of the father" is included in the definition of a child. Therefore, if a father does in fact "recognize" his illegitimate child, then the child is entitled to inherit. By virtue of this statute, the recognized, illegitimate child of the father may inherit from that father without other statutory legitimization.

A distinction between "recognized, illegitimate child" and "legitimated children" is therefore inherent in the Probate Code, yet both are

entitled to inherit from their biological father. Section 42 sets out the inheritance rights of legitimated children by any one of various means. Jones v. Davis, 616 S.W.2d 276 (Tex.Civ.App.--Houston (1st Dist.) 1981, writ granted). A biological father may "legitimize" his child by several different means: 1) a voluntary legitimization proceeding by way of a statement of paternity, TEX.FAM.CODE ANN. SECTION 13.21 (1980); or 2) he may marry the mother of the child. See Scott v. State, 501 S.W.2d 96 (Tex.Cr. 1973). A court of competent jurisdiction may also "legitimize" the child by an involuntary legitimization proceeding by way of a paternity suit. TEX.FAM. CODE ANN. SECTION 13.01 et seq (1980).

The definition of a child in Section 3(b), on the other hand, provides that a recognized, illegitimate child is a child for the purposes of the Code. When applied in the context of the case before us, that being the status of an afterborn, illegitimate child, the Probate Code establishes the right of a pretermitted child (as defined in Section 3(b) to include a recognized, illegitimate child) to inherit from a father if not provided for in the will:

> "Section 67(b) Where No Child Was Living When Will Was Executed. Every last will and

> testament made when the testator had no child living, wherein any child he might have is not provided for or mentioned, if at the time of his death he shall leave a child, either born to him or adopted by him, or shall leave his wife enceinte of a child which shall be born, shall have no effect during the life of such afterborn or after-adopted child, and shall be void, unless such child dies within one year after the death of the testator; provided, however, that where a surviving husband or wife is the father or mother of all of the testator's children, exclusive of adopted children, and said surviving husband or wife is the principal beneficiary in said testator's last will and testament, to the entire exclusion, by silence or otherwise, of all of said testator's children, then and in that event the foregoing provisions of this Section shall not apply or be considered in the construction of said last will and testament."
>
> TEX.PROB.CODE ANN. SECTION 67(b) (1980); see Burton v. Connecticut General Life Ins. Co., 72 S.W.2d 318 (Tex.Civ.App.--Fort Worth 1934, writ ref'd).

Thus, the only requirement for the illegitimate child to inherit from the father is to prove recognition.

Recognition by the biological father requires a factual determination. See Garza v. Cavazos, 221 S.W.2d 549, 553 (Tex. 1949). We note the proof problems inherent in establishing recognition when no well-defined legal parameters exist, especially when the biological father's

voice is silenced by death. Recognition in other jurisdictions is equated with acknowledgement of the child through some judicial proceeding or public statement in writing. See Lalli v. Lalli, supra--New York statute requires judicial determination; Mathews v. Lucas, 427 U.S. 495 (1976)--Social Security Act requires acknowledgement in writing that child is offspring of father; Labine v. Vincent, 401 U.S. 532 (1971)--Louisiana statute requires execution of statement of paternity by mother and father before a notary acknowledging that he is the natural father; Trimble v. Gordon, supra--Illinois statute requires formal acknowledgement of paternity in writing.

In light of this examination of the inheritance rights of legitimated children and recognized, illegitimate children, we now determine the rights of the child in the case before us. It is uncontroverted that the child is illegitimate, i.e., one born out of lawful wedlock. No evidence has been presented that any statutory means of legitimization has occurred. Therefore, the child is not entitled to inherit from the decedent as a legitimated child under Section 42 of the Code.

About the right of the child to inherit as a recognized, illegitimate child of the father, the

trial court failed to submit to the jury for a determination of the question of recognition by the father even though the sole issue submitted to the jury was objected to by the appellants on this specific ground. An issue posing the question of recognition should have been submitted. Garza v. Cavazos, supra at 553. Appellants' first point is sustained. We do not reach their second and third points of error.

The judgment of the trial court is reversed and the cause is remanded for a new trial.

HORACE S. YOUNG
Associate Justice

Opinion delivered and
filed this the 20th
day of August, 1981.

APPENDIX C

IN THE SUPREME COURT OF TEXAS

NO. C-777

SANTA ANNA MARISCAL, AS NEXT FRIEND OF CESAR JAVIER MARISCAL, A MINOR	*	FROM HIDALGO
Petitioner	*	COUNTY
V.	*	THIRTEENTH
JOHN C. JOHNSON, EXECUTOR OF THE ESTATE OF L. F. NITTLER, DECEASED,	*	DISTRICT
Respondent	*	

PER CURIAM

This is a will contest. L. F. Nittler died on February 6, 1979, and John C. Johnson, executor, filed for probate the will executed on September 24, 1971. Santa Anna Mariscal, as next friend of her illegitimate son, Cesar Javier Mariscal, filed a petition to contest the will. She alleged that her son is the natural child of the decedent and, because the will makes no provision for him, he is a pretermitted child entitled to inherit from his father that portion of the estate to which he would be entitled if the decedent had died intestate. TEX. PROB. CODE ANN.

SECTION 67(b). The trial court declared the will void based on the jury's determination that the child was the natural child of the decedent. The court of appeals reversed and remanded the case, holding that the jury issue should have inquired as to whether the child had been "recognized" by the alleged father. 620 S.W.2d 905. Both parties have filed application for writ of error.

The question of whether an illegitimate child may be recognized in any manner other than that provided in section 42 of the Texas Probate Code is not properly presented for our review. We therefore express no opinion on the writing of the court of appeals on this question. We refuse both applications for writ of error, no reversible error.

OPINION DELIVERED: January 6, 1982

APPENDIX D

Section 42. Inheritance Rights of Illegitimate Children

(a) Maternal Inheritance. For the purpose of inheritance to, through, and from an illegitimate child; such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants, ascendants, and collaterals in all degrees and they may inherit from him and his issue.

(b) Legitimation by Marriage. Where a man, having by a woman a child shall afterwards intermarry with such woman, such child shall thereby be legitimated, so that he and his issue shall inherit from his father and from his paternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue.

(c) Legitimation by Voluntary Legitimation Proceeding. Where a man, having by a woman a child shall afterwards legitimate the child pursuant to a voluntary legitimation proceeding under Chapter 13, Family Code, such child and his issue shall inherit from his father but not from his paternal kindred; and the father, but not the

father's kindred, shall inherit from such child and his issue.

(d) Homestead Rights, Exempt Property, and Family Allowances. Such child shall also be treated the same as if he were a legitimate child of his mother, and, if legitimated by marriage or by voluntary legitimation, as if he were a legitimate child of his father, for the purpose of determining homestead rights, distribution of exempt property, and the making of family allowances.

(e) Marriages Null in Law. The issue also of marriages deemed null in law shall nevertheless be legitimate.

Amended by Acts 1977, 65th Leg., p. 762, ch. 290, Section 1, eff. May 28, 1977.

Opposition

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FILED
JUN 4 1982
ALEXANDER L. STEVAS,
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No. 81-2097

IN THE

Supreme Court of the United States

October Term, 1981

* * * * * * * *

SANTA ANNA MARISCAL, A/N/F/
OF CESAR JAVIER MARISCAL,
Petitioner,

v.

JOHN C. JOHNSON, EXECUTOR,
Respondent.

* * * * * * * *

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS, 13th SUPREME JUDICIAL DISTRICT OF TEXAS

* * * * * * * *

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QUESTIONS PRESENTED

A. WHETHER TEXAS STATUTES, REQUIRING AN ILLEGITIMATE CHILD TO BE RECOGNIZED BY HIS FATHER BEFORE HE CAN PRETERMIT A VALID WILL OF HIS FATHER, CONSTITUTES INVIDIOUS DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN, CONTRARY TO THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION.

B. ALTERNATIVELY, WHETHER TEXAS STATUTES FOR INTESTATE SUCCESSION BY ILLEGITIMATE CHILDREN, AS TO THEIR FATHER'S ESTATE, CONSTITUTES AN INVIDIOUS DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN, CONTRARY TO DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION.

LIST OF ALL PARTIES

John C. Johnson, Executor, Jan Alden Nittler, Dyana Nittler Richardson, Roger Kent Nittler, Billy Don Nittler, Randy Bert Nittler, Jody Trent Nittler, Clara Louise Lundy, Nancy Kate Gernentz, Linda Sue Fasano, Mark Harold Nittler, Luann Denise Nittler, Cleon George Johnson, La Noe Ann Walthall, Tule Claire Filla, Bobbie Jean Miller, George H. Hollamon, Mattie Louise Jones, Donna Lynn McBeth, David Earl Johnson, Judy Carpenter, Carey P. McTaggart, Yvonne Courtney, Faye M. Pryor, George L. McTaggart, Annie Workman, Barbara Jo Davis, Herbert W. Johnson, Frank A. Johnson, Janice M. Canady, Dora Nittler, Santa Anna Mariscal and Cesar Javier Mariscal.

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B. Alternatively, The Laws Of Texas Providing For Intestate Inheritance By Illegitimate Children, Which Were In Effect At The Time In Question, Are Not Unconstitutional, In That They Do Not Invidiously Discriminate Against Illegitimate Children Under The Due Process and Equal Protection Clauses Of The United States Constitution 14

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No. 81-2097

IN THE

Supreme Court of the United States

October Term, 1981

* * * * * * * *

SANTA ANNA MARISCAL, A/N/F/
OF CESAR JAVIER MARISCAL,
Petitioner,

v.

JOHN C. JOHNSON, EXECUTOR,
Respondent.

* * * * * * * *

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS, 13th SUPREME JUDICIAL DISTRICT OF TEXAS

STATUTES INVOLVED

VERNON'S ANNOTATED TEXAS STATUTES (PROBATE CODE), SECTION 67(a), effective at all times material hereto, provides in pertinent part as follows:

> "Where No Child Was Living When Will Was Executed. Every last will and testament made when the testator had no child living, wherein any child he might have is not provided for or mentioned, if at the time of his death he shall leave a child, either born, to him or adopted by him, or shall leave his wife enceinte of a child

> which shall be born, shall have no effect during the life of such afterborn or afteradopted child, and shall be void, unless such child dies within one year after the death of the testator; provided, however, that where a surviving husband or wife is the father or mother of all of the testator's children, exclusive of adopted children, and said surviving husband or wife is the principal beneficiary in said testator's last will and testament, to the entire exclusion, by silence or otherwise, of all of said testator's children, then and in that event the foregoing provisions of this Section shall not apply or be considered in the construction of said last will and testament."

VERNON'S ANNOTATED TEXAS STATUTES (PROBATE CODE), SECTION 3(b), effective at all times material hereto provides in pertinent part as follows:

> "(b) 'Child' includes an adopted child, whether adopted by an existing or former statutory procedure of by acts of estoppel, but, unless expressly so stated herein, does not include an unrecognized, illegitimate child of the father."

VERNON'S ANNOTATED TEXAS STATUTES (PROBATE CODE), SECTION 42, effective January 29, 1967 until August 29, 1979, provides in pertinent part as follows:

> "Sec. 42. Inheritance Rights of Illegitimate Children.
>
> '(a) Maternal Inheritance. For the purpose of inheritance to, through, and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit

from his mother and from his maternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue.

'(b) Legitimation by Marriage. Where a man, having by a woman a child shall afterwards intermarry with such woman, such child shall thereafter be legitimated, so that he and his issue shall inherit from his father and from his paternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue.

'(c) Legitimation by Voluntary Legitimation Proceeding. Where a man, having by a woman a child shall afterwards legitimate the child pursuant to a voluntary legitimation proceeding under Chapter 13, Family Code, such child and his issue shall inherit from his father but not from his paternal kindred; and the father, but not the father's kindred, shall inherit from such child and his issue.

'(d) Homestead Rights, Exempt Property, and Family Allowances. Such child shall also be treated the same as if he were a legitimate child of his mother, and if legitimated by marriage or by voluntary legitimation, as if he were a legitimate child of his father, for the purpose of determining homestead rights, distribution of exempt property, and the making of family allowances.

'(e) Marriages Null in Law. The issue also of marriages deemed null in law shall nevertheless be legitimate."

VERNON'S ANNOTATED TEXAS STATUTES (FAMILY CODE), SECTION 12.02, effective at all times material hereto, provides in pertinent part as follows:

> "§ 12.02. Relation of Child to Father
>
> (a) A child is the legitimate child of his father if the child is born or conceived before or during the marriage of his father and mother.
>
> (b) A child is the legitimate child of his father if at any time his mother and father have attempted to marry in apparent compliance with the laws of this state or another state or nation, although the attempted marriage is or might be declared void, and the child is born or conceived before or during the attempted marriage."

VERNON'S ANNOTATED TEXAS STATUTES (FAMILY CODE), SECTIONS 13.08 and 13.09, effective at all times material hereto, provide in pertinent part as follows:

> "§ 13.08 Decree
>
> (a) On a verdict of the jury, or on a finding of the court, if there is no jury, that the alleged father is the father of the child, the court shall issue an order designating the alleged father of the child.
>
> (b) On a verdict of the jury, or on a finding of the court, if there is no jury, that the alleged father is not the father of the child, the court shall issue an order declaring this finding."
>
> "§ 13.09. Effect of Decree Establishing Paternity
>
> The effect of a decree designating the alleged father as the father of the child is to *create the*

parent-child relationship between the father and the child as if the child were born to the father and mother during marriage." (Emphasis added).

VERNON'S ANNOTATED TEXAS STATUTES (FAMILY CODE), SECTION 13.21, effective at all times material hereto, provides in pertinent part as follows:

"§ 13.21. Voluntary Legitimation

(a) If a statement of paternity has been executed by the father of an illegitimate child, the father or mother of the child or the Texas Department of Human Resources may file a petition for a decree designating the father as a parent of the child. The statement of paternity must be attached to the petition.

(b) The court shall enter a decree designating the child as the legitimate child of its father and the father as a parent of the child if the court finds that:

(1) The parent-child relationship between the child and its original mother has not been terminated by a decree of a court;

(2) the statement of paternity was executed as provided in this chapter, and the facts stated therein are true; and

(3) the mother or the managing conservator, if any, has consented to the decree

(c) The requirement of consent of the mother is satisfied if she is the petitioner. If the entry of the decree is in the best interest of the child,

> the court may consent to the legitimation of the child in lieu of the consent of the mother or managing conservator.
>
> (d) A suit for voluntary legitimation may be joined with a suit for determination under Chapter 15 of this code.
>
> (e) A suit under this section may be instituted at any time.

VERNON'S ANNOTATED TEXAS STATUTES (FAMILY CODE), SECTIONS 13.22 and 13.23, effective at all times material hererto, provide in pertinent part as follows:

> "§13.22. Statement of Paternity.
>
> The statement of paternity authorized to be used in Section 13.21 of this code must be executed by the father of the child as an affidavit and witnessed by two credible adults. The affidavit must clearly state that the father acknowledges the child as his child, that he and the mother, who is named in the affidavit, were not married to each other at the time of conception of the child or at any subsequent time, and that the child is not the legitimate child of another man. The statement must be executed before a person authorized to administer oaths under the laws of this state".

STATEMENT OF THE CASE

Respondent is dissatisfied with a portion of the Statement of the Case set forth by Petitioner in her Petition, and some of the statements contained therein require challenge or clarification.

At the outset, it should be noted that the Petitioner attempts to lead this Honorable Court to believe that

the issue before the Court involves the right of an illegitimate child to inherit from an intestate father. As is manifest from the Opinion of the Texas Court of Appeals for the Thirteenth Supreme Judicial District, attached hereto as Appendix "A", this was not the issue passed upon by the Texas Courts. This Opinion reflects that the question ruled upon by the Texas Courts was the issue of whether or not an illegitimate child had to establish that he has been recognized by his father, before he would be allowed to pretermit or set aside the valid will of his father, executed prior to his birth. The Texas Courts expressly refused to rule upon Points of Error, raised by this Respondent, involving the question of intestate succession by an illegitimate child.

Moreover, the Statement by Petitioners would lead the Court to believe that Cesar Javier Mariscal, his natural mother, and L.F. Nittler, his claimed father, were living together as a family unit. While the full record, or a joint Appendix, are not before this Court at the present posture of this case, Respondent would respectfully show that the record of this case reveals that while the mother of Cesar Javier Mariscal may have been spending most nights with L.F. Nittler, Deceased, she maintained a separate home for her several illegitimate children, including Cesar Javier Mariscal and that, in fact, Cesar Javier Mariscal was only at the home of L.F. Nittler from two to five times before the death of the said L.F. Nittler.

Except as noted above, the Statement of the Case in the Petition for Writ of Certiorari is substantially correct, insofar as it relates to the matter here before the Court.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

Petitioner Bases Her Application For Writ of Certiorari Upon The Grounds That The Texas Statutes Pertaining to Intestate Succession, In Effect At The Time Of The Death of L.F. Nittler, Deceased, Are Unconstitutional Because They Bar Illegitimate Children From Sharing In Their Intestate Father's Estate, Contrary To The Due Process And Equal Protection Clauses Of The United States Constitution. The Texas Courts, In Effect, Did Not Concern Themselves With Intestate Succession, But Instead, Held That An Illegitimate Child Must Establish That He Has Been Recognized By His Father Before He Is Allowed to Pretermit, Or Set Aside, His Father's Will. The Texas Courts Did Not, In Their Holding, Specify What Actions By The Father Would Be Necessary To Constitute Recognition. Therefore, The General Concept Of The Requirement Of Recognition Before Pretermition Of A Will By An Illegitimate Child Protects Valid State Interests And Is Not Contrary To The Equal Protection And Due Process Provisions Of The United States Constitution.

Alternatively, The Texas Statutes Pertaining To Intestate Succession By Illegitimate Children, Contained In The Texas Probate Code, When Such Provisions Are Read In Pari Materia With Applicable Provisions Of The Texas Family Code, Do Not Constitute Invidious Discrimination Against Illegitimate Children, Contrary To The Due Process And Equal Protection Clauses Of The United States Constitution.

A.

THE OPINIONS OF THE TEXAS COURTS COMPLAINED OF BY PETITIONER SIMPLY HELD, IN EFFECT, THAT BEFORE AN ILLEGITIMATE CHILD COULD PRETERMIT HIS FATHER'S VALID WILL, HE MUST PROVE THAT HE HAD BEEN "RECOGNIZED" BY THE FATHER, AND THIS HOLDING PROTECTS A VALID STATE INTEREST AND IS NOT CONTRARY TO THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION.

As demonstrated by the Opinion of the Texas Court of Appeals (Appendix "A"), L.F. Nittler, died on February 6, 1979 and left a valid Will, which was executed on September 24, 1971. Thereafter, this Will was admitted to probate and Respondent, John C. Johnson, was appointed Independent Executor in accordance with this Will. The Will devised all of L.F. Nittler's estate to his nieces and nephews.

Thereafter, Santa Anna Mariscal, as next friend of Cesar Javier Mariscal, filed a Petition in the Probate Court contesting the Will. She contended that Cesar Javier Mariscal was born on September 26, 1977, after the execution of the Will and that he was entitled to pretermit or set aside the Will, as an afterborn child, claiming as an illegitimate son of L.F. Nittler.

The Texas statute relating to the rights of afterborn children to pretermit a Will of a parent is Section 67(b) of Vernon's Annotated Texas Statutes (Probate Code). This statute is set forth verbatim herein under the Section denoted "Statutes Involved". It states, in effect, as pertinent to the case at bar, that if a parent executed a Will at the time when he or she has no child living, and after the execution of the Will, the Testator should have

an afterborn or afteradopted child, the Will shall be void and of no effect. It also provides that if the Testator leaves substantially all of the estate to a spouse who is the mother of said afterborn child, "the foregoing provision of this Section shall not be considered in the *construction* of said last will and testament". (Emphasis added)

The term "child" as used in the aforesaid Section 67(b) of the Texas Probate Code, is defined in Section 3, Vernon's Annotated Texas Statutes, as excluding an *unrecognized* illegitimate child of the father. This statute is also set forth verbatim under the Statutes Involved Sub-Section of this Brief.

Therefore, the very narrow issue before this Honorable Court is the question of whether or not the holding of the Texas Courts that an illegitimate child has to be "recognized" by his father, before he is allowed to pretermit his father's Will, constitutes invidious discrimination against illegitimate children, contrary to the due process and equal protection clauses of the United States Constitution. The Texas Courts, in this case, have not ruled on the constitutionality of the Texas statutory provisions pertaining to the rights of illegitimate children to inherit from their natural intestate father, as Petitioner would have this Court believe.

This Court has recognized in the case of *Lalli v. Lalli*, 439 U.S. 259, 99 S. Ct. 518, 58 L.Ed.2d 503 (1978), that State statutes can treat illegitimate children differently from the treatment afforded legitimate children, if a valid state interest is served. It should be manifest to this Court at the outset that there is a vast legal and philosophical difference between the right of an illegitimate child to inherit from an intestate parent, and

the right of an unrecognized illegitimate child to pretermit or set aside a valid will of his parent.

The Courts of Texas have constantly held that the Texas Pretermition Statute, Section 67, Vernon's Annotated Texas Statutes (Probate Code), set forth above, and its predecessors, are to be treated as contemporaneously engrafted upon the Will itself; and considered as written into the Will of the testator. *Hill v. Joseffy,* 259 S.W. 2d 760 (Tex. Civ. App. — San Antonio, 1953, no writ); *Taylor v. Martin's Estate,* 117 Tex. 302, 3 S.W.2d 408 (1928); and *Conroy v. Conroy,* 130 Tex. 508, 110 S.W. 568 (1937). In view of these authorities, it is clear that the Texas Pretermition Statute is a rule of will construction, and that if a "child" is born after the Will is executed, the Courts will irrebutably presume that the Testator would have made provision for such afterborn "child". By the provisions of Section 3, Vernon's Annotated Statutes (Probate Code), it is expressly provided that the term "child" does not include an unrecognized illegitimate child.

The Texas Courts have long recognized the sanctity of a person's written Will, and have held that they will do their utmost to uphold a valid Will, stating that a Testator has the same absolute right to bestow his property at death as he has to convey it during his lifetime. The Courts have further held that the fact that the Testator may have left nothing to needy relatives, including children, or may have made an unfair or unwise disposition of his property, does not of itself invalidate the Will. In this connection, see *In Re Carruthers' Estate,* 151 S.W. 2d 946 (Tex. Civ. App. — Beaumont, 1941, writ dis'm. judgment correct); *McQueen v. Stephens,* 100 S.W. 2d 1053, (Tex. Civ. App. — Texarkana (1955); and *Elkin v. Sanders,* 397 S.W.2d 309, (Tex. Civ. App. — Amarillo, 1965, writ ref'd, n.r.e.).

From the foregoing authorities, and as a matter of historical legal evolution, it is obvious that the law of pretermition, under the English common law and under the statutes of various states, including Texas, was predicated upon the concept that if a parent made a Will, and thereafter had a legitimate child, there was a natural presumption that the parent would have intended to provide for the child in his Will unless a contrary intent was manifest from the Will itself. The law of Texas has taken this inference even further, and allowed an illegitimate afterborn "child" to pretermit a Will if he has been recognized by his father. In certain instances, as noted above, even a legitimate afterborn "child" is not allowed to pretermit. It would be illogical and contrary to human experience for the Courts to go further and irrebutably presume that a father would have made provisions for an unrecognized "child" if the illegitimate "child" had been living at the time the Will was made.

The Courts of Texas have specifically recognized that the interest of a biological father in an illegitimate child is not necessarily the same as his interest in his legitimate child. See *In the Interest of T.E.T.*, 603 S.W. 2d 793 (Tex. 1980). In fact, the Opinion of Justice Powell, joined by Chief Justice Burger and Justice Stewart, in the *Lalli* case, supra, stated:

> "The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed, the mother may not know who is responsible for her pregnancy."

It would appear to logically follow that the creation by the Courts of an irrebutable presumption, that the father of an unrecognized illegitimate "child" would have made provision for such "child" if the child had been living at the time the Will was made, would be totally contrary to human experience and, would compel a totally illogical presumption.

In view of the long recognition by the Texas Courts of the sanctity of Wills, and of the rights of a Testator to freely dispose of his property by a Will in any manner he sees fit, there is a valid state interest in perpetuating the sanctity of Wills, by requiring that illegitimate children be recognized before they are permitted to pretermit, or set aside, an otherwise valid Will of their father. Such a provision is clearly necessary for the orderly distribution of the estates of persons who die leaving a written Will, and is fully compatible with the philosophy in both the cases of *Trimble v. Gordon,* 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31, (1977); and *Lalli* v. *Lalli,* 439 U.S. 259, 99 S.Cr. 518, 58 L.Ed. 2d 502 (1978).

In this connection, it is to be noted that the Opinions of the Texas Courts involved in this case simply required the Petitioner to establish, as an element of her case, that Cesar Javier Mariscal had been recognized, in some unspecified manner. The Opinion of the Court of Appeals notes the uncertainty of the law in Texas as to what constitutes recognition. Therefore, the question of what the Courts of Texas may hereafter decide constitutes recognition, and the constitutionality in such holding, is not before this Court.

B.

ALTERNATIVELY, THE LAWS OF TEXAS PROVIDING FOR INTESTATE INHERITANCE BY ILLEGITIMATE CHILDREN, WHICH WERE IN EFFECT AT THE TIME IN QUESTION, ARE NOT UNCONSTITUTIONAL, IN THAT THEY DO NOT INVIDIOUSLY DISCRIMINATE AGAINST ILLEGITIMATE CHILDREN UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION.

Petitioner contends that the rights of an illegitimate child to inherit from an intestate parent, which were in effect on February 6, 1979, must be determined by looking solely to the provisions of Vernon's Annotated Texas Statutes (Probate Code, Section 42). This statute has been cited in full above under the Section, Statutes Involved. It is to be noted that this statute specifically limits itself to the inheritance rights of illegitimate children. In substance, this statute provides that an illegitimate child can inherit from his mother under any circumstances, and that he may inherit from his father if the father afterwards marries the mother, or if the child is legitimated by voluntary legitimation provided under the provisions of the Texas Family Code.

It is to be noted that, at the time in question, other provisions of the Texas statutes pertaining to the rights of illegitimate children allowed them, or any person with an interest in such child, to bring an involuntary paternity suit against the father. The pertinent parts of these statutory provisions may be found in Sections 11.02, 11.03, 13.08, and 13.09, Vernon's Annotated Texas Statutes (Family Code). It is to be particularly noted that Section 13.09 of said Family Code provides that the effect of a decree establishing paternity is to create the

parent-child relationship between the father and the child "as if the child were born to the father and mother during marriage".

Sub Section (a), Article 12.02, Vernon's Annotated Texas Statutes (Family Code), effective at the time hereto, provides that a child is a legitimate child of a father, if born or conceived during the marriage of his father and mother. Therefore, under the above cited provisions, if involuntary suit to establish paternity had been brought in a Court of competent jurisdiction, and a decree establishing paternity entered, the child would have become, in law, a legitimate child.

It is an elementary rule of statutory construction, under the laws of the State of Texas, that if there are two or more statutes dealing with the same subject matter, or having the same general purpose, they will be considered in pari materia, so that their provisions may be harmonized, if possible, and all of their provisions given effect. *Trinity Universal Insurance Company v. McLaughlin,* 373, S.W. 2d 66 (Tex. Civ. App. — Austin, 1963, no writ history; *State v. Dyer,* 145 Tex. 586, 200 S.W. 2d 813, (1947); and 53 *Tex Jr.2d* (Statutes), Sec. 186. The Texas Courts have also held that the statutes of the state will be interpreted in such manner as to render them constitutional, rather than declaring such statutes unconstitutional, if by reasonable construction they can be made constitutional. *McKinney v. Blankenship,* 154 Tex. 632, 282 S.W. 2d 691 (1965); and 53 *Tex. Jur. 2d* (Statutes), Section 158.

Therefore, as the Opinion of the Texas Court of Appeals held in its Opinion (See Appendix "A"), when the applicable statutes of the State of Texas are read together, an illegitimate child could have inherited

from his father, under the laws of the State in effect at the time in question by an involuntary legitimation proceeding, by means of a paternity suit, under the above cited Sections of the Family Code of the State of Texas, (which would make the "child" legitimate); or by a voluntary legitimation proceeding instituted by the father under said Family Code. Of course, under the provisions of Section 42 of the Texas Probate Code, cited above, an illegitimate child could also have inherited from his intestate father if the parents married after the child was born.

The means by which an illegitimate child could inherit from an intestate father, as set forth above, are even more comprehensive than the provisions of the New York statutes considered by this Court in the case of *Lalli v. Lalli,* 439, U.S. 259, 99 S. Ct. 518, 58 L.Ed. 2d 503 (1978). In the *Lalli* case, the state statute provided that an illegitimate child could inherit from his father if a Court of competent jurisdiction had, during the lifetime of the father, entered an Order declaring paternity as between the child and the father. In *Lalli,* supra, this Court held that this provision adequately protected the intestate inheritance rights of illegitimate children, and protected a legitimate state interest in providing for the just and orderly disposition of property at death.

The Case of *Trimble v. Gordon,* 430 U.S. 762, 97 S. Ct. 1459, 52 L.Ed.2d 31, (1977), involved an Illinois statute which provided that an illegitimate child could inherit from an intestate father only if the mother and father of the child had later married, and this Court held that such a restriction on the intestate inheritance rights of illegitimate children unlawfully discriminated against such children under the due process and equal protection clauses of the United States Constitution.

In view of the foregoing, it is respectfully submitted that, even if this case were to be considered as one involving the rights of an illegitimate child to inherit from an intestate father, the laws of Texas in effect, at the time in question, included all of the elements considered by this Court in the New York statute ruled valid in the *Lalli* case, supra. It is further clear that the law of the State of Texas was not so restrictive as the Illinois statutes condemned in the *Trimble* case, supra. Therefore, the intestate inheritance statutes of Texas, considered in pari materia with other laws of the State, fully protected the rights of illegitimate children, while at the same time validly protecting a state interest, in providing for the just and orderly disposition of property at death.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari in this cause should be in all things denied.

Respectfully submitted,

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BY: _____
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CERTIFICATE OF SERVICE

I, RALPH L. ALEXANDER, do hereby certify that I have mailed three true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari, with first class postage pre-paid, addressed to L. Aron Pena, of Pena, McDonald, Prestia & Ybanez, Box 54, Edinburg, Texas 78539, on this the 3rd day of June, 1982.

_____

Ralph L. Alexander

Appendix

NO. 1742

IN THE COURT OF CIVIL APPEALS
FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS
SITTING AT CORPUS CHRISTI, TEXAS

* * * * * * * *

JOHN C. JOHNSON, EXECUTOR OF THE ESTATE OF N.L. NITTLER, DECEASED, APPELLANT,

v.

SANTA ANNA MARISCAL, AS NEXT FRIEND OF CESAR JAVIER MARISCAL, A MINOR, APPELLEE

* * * * * * * *

On appeal from the County Court at Law No. 2 of the Hidalgo County, Texas

* * * * * * * *

OPINION

This is a will contest case. Appellants, executor and legatees under the will of L.F. Nittler, deceased, challenge the judgment of the trial court which declared said will void. The judgment was based on the jury's determination that the child was born to the decedent after the execution of the will. TEX. PROB. CODE ANN. SECTION 67(b) (1980). We reserve and remand.

L.F. Nittler executed a will on September 24, 1971, appointing appellant, John C. Johnson, independent executor and devising his estate to his nieces and nephews. Nittler was previously married on two

occasions, neither of which unions produced children. Nittler died on February 6, 1979, and Johnson filed the will for probate and applied for issuance of letters Testamentary. An order admitting the will to probate and authorizing Letters Testamentary was signed on February 20, 1979.

On February 27, 1979, Santa Anna Mariscal, as next friend of Cesar Javier Mariscal, appellee, filed a petition contesting the will. The contestant alleged that Cesar, born September 26, 1977 (six years after the execution of the will), is the natural child of the decedent. As a pretermitted child, he is allegedly entitled to inherit from his father that portion of the estate to which he would be entitled if the decedent had died intestate. TEX. PROB. CODE ANN. SECTION 67(b) (1980). Because the decedent was unmarried at the time of his death and had no children, the appellee, therefore, should inherit the entire estate.

Evidence at the trial detailed the relationship between the decedent and Mrs. Mariscal. The two had know each other for some time and were living together at the time the child was born. Although Mrs. Mariscal testified that the decedent was the father of the child, the birth certificate of the child did not list Mr. Nittler as the father. See Davis v. Davis, 521 S.W. 2d 603 (Tex. 1975); Wickware v. Session, 538 S.W. 2d 466 (Tex. Civ. App. — Tyler 1976, writ ref'd n.r.e.). Mrs. Mariscal testified that the decedent's name was omitted from the birth certificate to save the decedent and his family embarrassment.

On several occasions, both during the pregnancy of Mrs. Mariscal and after the birth of the child, the decedent allegedly "boasted" that he was the father of

the child. Members of his family, however, testified that they never heard such representations. No tests matching blood type or tissue were ever performed to establish paternity, nor did the decedent ever execute a statement of paternity under Section 13.22 of the Family Code. TEX. FAM. CODE ANN. SECTION 13.22 (1980). Likewise, no voluntary or involuntary legitimization proceedings were ever instigated under TEX. FAM. CODE. ANN. SECTION 13.01 et seq. (1980), nor were adoption proceedings undertaken by the decedent. TEX. FAM. CODE ANN. SECTION 16.01 et seq. (1980).

The uncontroverted evidence adduced at the trial also established that Mrs. Mariscal was married to Belisario Hernandez on June 6, 1956, and that the parties were never divorced. During the period of time when the child would have been conceived, there was testimony that Mr. Hernandez lived some eighty miles from Mrs. Mariscal's residence. Mrs. Mariscal testified, however, that she had not seen her husband in many years. Under these facts and the admission of all parties, the child was clearly illegitimate. See TEX. PROB. CODE ANN. SECTION 42(b) (1980) and TEX. FAM. CODE ANN. Section 12.02 (1980).

All parties stipulated; (1) that L.F. Nittler died on February 6, 1979; (2) that L.F. Nittler signed and executed his will on September 24, 1971, at a time when he had no living children, natural or adopted; and (3) that Cesare Javier Mariscal was born on September 26, 1977. Only one issue was submitted to the jury:

> "Do you find from a preponderance of the evidence that Cesar Javier Mariscal is the natural child of L.F. Nittler?
>
> Answer 'Yes' or 'No'
>
> Answer Yes"

Based on this finding, the trial court entered a judgment which set aside the prior order admitting the will to probate and declared the will void because it did not provide for the child, Cesar Javier Mariscal, born after the execution of the will. From this judgment, appellants bring this appeal.

Three points of error are rasied wherein the appellants contend that the trial court's judgment is erroneous because of: (1) the failure of the trial court to submit an issue about whether the illegitimate child had been recognized by the decedent; (2) the lack of standing of the appellee child since the child would not have been able to inherit from the father had the father died intestate; and (3) the lack of clear and convicing proof to defeat the prosumption that the child was the product of the union of Santa Anna Mariscal and her husband since there was no evidence of non-access. We need only consider the first point of error to resolve this appeal, that being the failure of the trial court to submit an issue determining whether the decedent recognized the illegitimate child before his death.

The rights of illegitimate children and statutory classifications which tend to limit those rights have undergone close examination by the courts of this nation in recent years. It is well-settled law that classifications based on illegitimacy, while not being subject to "strict scrutiny", must be substantially related to permissible state interests. Lalli v. Lalli, 439 U.S. 259 (1978), Trimble v. Gorden, 430 U.S. 762 (1977) Weber v. Aetna Casualty & Surety Company, 406 U.S. 164 (1972). These statutes, which tend to differentiate between legitimate and illegitimate children, must bear some rational relationship to legitimate state purposes. As applies to inheritance stautes, the Supreme Court has

recognized that the State may apply "a more demanding standard" for illegitimate children who seek to inherit from their father's estate in order to promote the efficient administration of a decedent's estate and to avoid spurious claims arising out of paternity actions. Lalli v. Lalli, supra at 523.

The Texas statutes have been amended in order to provide an appropriate legal framework to evaluate the right of an illegitimate child to inherit from his father if one of several statutory procedures are followed to legitimize the child. See Ramon v. Califano, 493 F.Supp. 158 (W.D. Tex. 1980); Lovejoy v. Lillie, 569 S.W.2d 501 (Tex. Civ. App. — Tyler 1978, writ ref'd n.r.e.).

> "Sec. 42. Inheritance Rights of Legitimated Children
>
> (b) Paternal Inheritance. For the purposes of inheritance, a child is the legitimate child of his father if the child is born or conceived before or during the marriage of his father and mother or is legitimated by a court decree as provided by Chapter 13 of the Family Code, or if the father executed a statement of paternity as provided by Section 13.22 of the Family Code, or a like statement properly executed in another jurisdiction, so that he and his issue shall inherit from his father and from his parental kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue."
> TEX. PROB. CODE ANN. SECTION 42 (1980); See Bell v. Hinkle, 607 S.W. 2d 936 (Tex. Civ. App. — Houston (14th Dist.) 1980. no writ); Mata v. Moreno, 601 S.W. 2d 58 ITex. Civ. App. — Houston (1st Dist) no writ).

This statute, while providing a means for the illegitimate child to inherit from his father by way of statutory

legitimization, also serves state interests by establishing safeguards to protect the sanctity of a will and to provide for the orderly settlement of estates. As such, equal protection of the laws is afforded to illegitimates.

The Probate Code in 3(b) provides another means for an illegitimate child to inherit from its biological parents without complying with these statutory legitimization procedures. The definition of "child" as set out in the Code is as follows:

> "(b) 'Child' includes an adopted child, whether adopted by any existing or former statutory procedure or by acts of estoppel, but, unless expressly so stated herein, *does not include an unrecognized, illegitimate child of the father.*" (Emphasis added). (TEX. PROB. CODE ANN. SECTION 3(b) (1980).

By expressly including an "*unrecognized* illegitimate child of the father", the statute impliedly provides that a "*recognized,* illegitimate child of the father" is included in the definition of a child. Therefore, if a father does in fact "recognize" his illegitimate child, then the child is entitled to inherit. By virtue of this statute, the recognized illegitimate child of the father may inherit from that father without other statutory legitimization.

A distinction between "recognized illegitimate child" and "legitimated children" is therefore inherent in the Probate Code, yet both are entitled to inherit from their biological father. Section 42 sets out the inheritance rights of legitimated children by any one of various means. Jones v. Davis, 616 S.W. 2d 276 (Tex. Civ. App. — Houston (1st Dist.) 1981, writ granted). A biological father may "legitimize" his child by several

different means: 1) a voluntary legitimation proceeding by way of a statement of paternity. TEX. FAM. CODE ANN. SECTION 13.21 (1980); or 2) he may marry the mother of the child. See Scott v. State, 501 S.W. 2d 96 (Tex. Cr.. 1973). A court of competent jurisdiction may also "legitimize" the child by an involuntary legitimization proceeding by way of a paternity suit, TEX. FAM. CODE ANN. SECTION 13.01 et seq. (1980).

The definition of a child in Section 3(b), on the other hand, provides that a recognized, illegitimate child is a child for the purposes of the Code. When applied in the context of the case before us, that being the status of an afterborn, illegitimate child, the Probate Code establishes the right of a pretermitted child (as defined in Section 3(b) to include a recognized, illegitimate child) to inherit from a father if not provided for in the will:

> "Section 67(b) Where No Child Was Living When Will Was Executed. Every last will and testatment made when the testator had no child living, wherein any child he might have is not provided for or mentioned, if at the time of his death he shall leave a child, either born to him adopted by him, or shall leave his wife enceinte of a child which shall be born, shall have no effect during the life of such afterborn or afteradopted child, and shall be void, unless such child dies within one year after the death of the testator; provided however, that where a surviving husband or wife is the father or mother of all of the testator's children, exclusive of adopted children, and said surviving husband or wife is the principal beneficiary in said testator's last will and

> testament, to the entire exclusion, by silence or otherwise, of all of said testator's children, then and in that event the foregoing provisions of this Section shall not apply or be considered in the construction of said last will and testament."
>
> TEX. PROB. CODE ANN. SECTION 67(b) (1980); see Burton v. Connecticut General Life Ins. Co., 72 S.W. 2d 318 (Tex. Civ. App—Fort Worth 1934, writ ref'd).

Thus, the only requirement for the illegitimate child to inherit form the father is to prove recognition.

Recognition by the biological father requires a factual determination. See Garza v. Cavazos, 221, S.W. 2d 549, 553 (Tex. 1949). We note the proof problems inherent in establishing recognition when no well-defined legal parameters exist, especially when the biological father's voice is silenced by death. Recognition in other jurisdictions is equated with acknowledgment of the child through some judicial proceeding or public statement in writing. See Lalli v. Lalli Supra — New York statute requires judicial determination; Mathews v. Lucas, 427 U.S. 495 (1976) — Social Security Act requires acknowledgment in writing that child is offspring of father; Labine v. Vincent, 401 U.S. 532 (1971)—Louisiana statute requires execution of statement of paternity by mother and father before a notary acknowledging that he is the natural father; Trimble v. Gordon, supra — Illinois statute requires formal acknowledgment of paternity in writing.

In light of this examination of the inheritance rights of legitimated children and recognized, illegitimate children, we now determine the rights of the child in the case before us. It is uncontroverted that the child is illegitimate i.e., born out of lawful wedlock. No evidence has been presented that any statutory means of legitimization has occurred. Therefore, the child is not entitled to inherit from the decedent as a legitimated child under Section 42 of the Code.

About the right of the child to inherit as a recognized, illegitimate child of the father, the trial court failed to submit to the jury for a determination of the question of recognition by the father even though the sole issue submitted to the jury was objected to by the appellants on this specific ground. An issue posing the question of recognition should have been submitted. Garza v. Cavazos, supra at 553. Appellant's first point is sustained. We do not reach their second and third point of error.

The judgment of the trial court is reversed and the cause is remanded for a new trial.

HORACE S. YOUNG

Associate Justice

Opinion delivered and
filed this the 20th
day of August, 1981.